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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 445

FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION

SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT.

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This supplemental brief is filed because the writer had received notice the case would not come on for hearing until April 13th, or after, but received a telegram it might come on the week beginning March 16th, hence necessitating a hurried preparation so as to have something of a brief on file. While not departing from the view of the original brief, we desire to point out further reasons for the denial of the writ.

We wish to add to the points, the following:

8. The Missouri Federal Court had no jurisdiction to enter a personal judgment under the record, which shows that at all times the defendant herein objected to the jurisdiction on proper grounds, and appeared for that purpose and no other and never submitted itself to the jurisdiction of the Missouri courts, or the Federal court.

Bank of Jasper *vs.* First National Bank, 258 U. S. 112; 66 L. Ed. 491.

Mich. Central R. R. Co. *vs.* Mex., 278 U. S. 492; 73 L. Ed. 471.

9. Notwithstanding any rule of the Missouri courts, the Federal courts, when a case is removed from the State court, applies the Federal rule as to whether the defendant is properly before the court.

Mechanical Appliance Co. *vs.* Castlemen, 215 U. S. 437; 54 Law Ed. 272.

10. Want of jurisdiction may be shown notwithstanding recitals in the record; that is recitals of record may be disputed.

Sullivan *vs.* Keeney, 148 Iowa 361.

Thompson *vs.* Thompson, 89 N. J. Equity 70; 103 Atlantic 856.

Hanna *vs.* Steadman, 230 N. Y. 236; 130 N. E. 566.

Galpin *vs.* Page, 18 Wal. 350; 21 Law Ed. 519.

ARGUMENT.

The Bank of Jasper *vs.* First National Bank of Rome, 258 U. S. 112; 66 Law Edition 491. This case in our view settles the controversy herein.

The first National Bank of Jasper, Florida, issued its certificates of deposit to the American Bank & Trust Company of Rome, Georgia, on account of notes given to the Rome Insurance Company of Georgia to raise capital. These notes were transferred by the American Bank & Trust Company to the First National Bank of Rome which brought suit on the certificates of deposit. Prior to that in litigation commenced in the State court in Florida against the three Georgia corporations involved, service was attempted to be made upon the Georgia corporations by publication. These corporations appeared specially, solely and only for the purpose of moving to quash the service. The motion was overruled by the State court and appeal taken to the Supreme Court on the interlocutory order. The agreement, however, being that this was not to be considered a general appearance. The Supreme Court sustained the lower court and when the case came back the Florida State court decree was entered *pro confesso* against all of the defendants, the three Georgia corporations, and specifically provided that the certificate held by the First National Bank at Rome was decreed to be impressed with the trust in favor of the plaintiff and the same adjudged to belong to the complainant and enjoining the Bank of Jasper from paying any part of these

proceedings to the First National Bank of Rome and that the certificates of deposit in so far as it included the proceeds derived from the note of the plaintiff was void. The Bank of Jasper insisted that this decree was *res adjudicata* as to its alleged liability to the First National Bank on the certificates of deposit, because they were judgments *in personam* against that bank and because certificates of deposit represented the proceeds of notes discounted.

The court in discussing this said:

> "It is clear that in Florida an appearance entered in the trial court specially for the purpose of quashing the service does not operate as a general appearance; but that if after such motion is made and overruled, the case proceeds to final decree, a defendant who prosecutes an appeal therefrom will be held to appear generally."

This Court points out that there was an appeal from an interlocutory order provided by the general statutes of Florida and that there was nothing to indicate that the right did not extend to orders concerning jurisdiction. It then says:

> "It certainly may not be assumed that the legislature intended that the exercise of the right conferred should operate as a general appearance and thus render moot a consideration of the ruling alone sought to be reviewed."

If a special appearance would authorize the rendition of a judgment in personam, certainly the summons as made was not sufficient to confer jurisdiction,

the only question submitted was the question of jurisdiction, this case stood so far as legal effect was concerned as if it had never been appealed to the Supreme Court of Florida. The lower state court had already overruled the motion to quash the service and the Supreme Court said it was right in so doing. We can see, under the circumstances, and because of the stipulation, the mere appeal did not confer jurisdiction.

So, the question comes back as to whether or not the effect of the special appearance was to permit the Florida state court upon the overruling of the motion to quash service, to proceed to render a judgment in personam. Applying the reasoning of this case to the case at bar, this Court must hold, it seems, that the action of the federal court in Missouri in rendering judgment against us, was the same as in the Jasper Bank case and that the same rules would apply and that upon appearance limited solely to the question of jurisdiction, the person in making the objection does not submit himself to the jurisdiction of the court even upon the overruling of the objection.

In Chicago Life Insurance Co. *vs.* Cherry, 244 U. S. 25, 61 L. E. 966. A judgment was recovered in a Tennessee court after the question of jurisdiction had been raised in the trial court and decided against defendant and the judgment was affirmed by two higher courts in Tennessee to which it was appealed. The plaintiff then brought a suit in Illinois against the defendant upon the Tennessee judgment. The defendant in that case claimed that the judgment sued on was void. The plaintiff recovered a judgment in Illi-

nois which was affirmed by the appellate court and a writ of certiorari was denied by the Illinois Supreme Court. The defendant then appealed to the Supreme Court of the United States claiming that the judgment of the Illinois court deprived it of its property without due process of law. The Supreme Court affirmed the judgment, holding that the Court in *Illinois* having determined that the *Tennessee* court had jurisdiction, the defendant was not deprived of his property without due process of law. *It did not hold that the decision of the Tennessee court precluded inquiry by the Illinois court as to the jurisdiction of the Tennessee court.* In fact the opinion indicates the jurisdiction of the Tennessee court could be inquired into by the Illinois court notwithstanding the Tennessee court had passed on the same question and that the decision of the Illinois court was final whether right or wrong. In the opinion of the Court by Judge Holmes he says:

> "The ground upon which the present judgment was sustained by the appellate court was that as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case it could not be reopened in this suit. The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction. A court that renders judgment against a defendant thereby tacitly asserts, *if it does not do so expressly*, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its *mere assertion of its own power*. (Thompson *v.* Whitman, 18 Wall. 457,

21 L. ed. 897.) *Even where its power depends upon a fact and it finds the fact.* (Tilt v. Kelsey, 207 U. S. 43, 51, 52 L. Ed. 95, 99, 28 Supt. Ct. Rep. 1.) A divorce might be held void for want of jurisdiction although the libelee had appeared in the cause. Andrews *v.* Andrews, 188 U. S. 14, 16, 17, 38, 47 L. Ed. 366, 367, 372, 23 Sup. Ct. Rep. 237. There is no doubt of the general proposition that, in a suit upon a judgment, the jurisdiction of the court rendering it over the person of the defendant may be inquired into. National Exch. Bank *vs.* Wiley, 195 U. S. 237, 49 L. Ed. 184, 25 Supt. Ct. Rep. 70; Haddock *v.* Haddock, 201 U. S. 562, 573, 51 L. Ed. 867, 871, 26 Sup. Ct. Rep. 525. 5 Ann. Cas. 1. But when the power of the court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. York *v.* Texas, 137 U. S. 15, 34 L. ed. 704, 11 Sup. Ct. Rep. 9; Western Life Indemnity Co. *v.* Rupp, 235 U. S. 261, 272, 283, 59 L. ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth *v.* Hammond, 166 U. S. 506, 517, 41 L. ed. 1096, 1099, 17 Sup. Ct. Rep. 665. It can be no other-

wise when a *court so decides as to proceedings* in another state. It may be mistaken upon what too *it is matter of fact, the law of the other state*. But a mere mistake of that kind is not a denial of due process of law."

It appears clearly from the foregoing quotation that the court did not consider that the court of one state could preclude inquiry by another court of its jurisdiction over the defendant even though that precise question was raised in the first case, unless it be a question as to whether under the local practice in the first state the defendant has submitted to the jurisdiction of that court. This distinction is clearly drawn. The court by way of illustration says that if a statute or the decision of a state should provide that the filing of a plea in abatement or an appeal constituted a submission to the jurisdiction of the court, then no right under the Constitution would be infringed by enforcing such a judgment. Furthermore, that the same rule applied when the court of one state so decides as to proceeding in another state, because the law of another state is a question of fact.

In Foster Milburn Co. *vs.* Chinn, 202 Fed. 175 (2d), a suit was brought in the State court of Kentucky against a foreign corporation. Summons was served upon an individual as managing agent. The defendant appears specially to quash the return of service on the ground that it had no office, officer or managing agent in the state and that service made would not bind it. The motion was overruled and the defendant still protesting the jurisdiction answered and took part

in the trial which resulted in a verdict against it. The defendants appealed to the Court of Appeals on the jurisdictional question alone, where it was affirmed on the ground that the defendant by appealing had waived its objection to the jurisdiction. Plaintiff then brought suit in Federal Court of New York, on the Kentucky judgment. The defendant answered alleging the foregoing facts and that the court had no jurisdiction. Judgment for plaintiff was affirmed by the Circuit Court of Appeals.

In the opinion it is said:

> "It is certainly the general rule of the Federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. Harkness *v.* Hyde, 96 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson *v.* Whitman, 18 Wall. 457, 21 L. Ed. 897. It is, however, the law of the state of Kentucky that though the defendant appears specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he *ipso facto* waives his objection and transforms his special into a general appearance."

It will be observed from the foregoing quotation that recognition was given to the Kentucky judgment *because of the law or usage in Kentucky that defendant's appeal constituted a general appearance.* For that reason the Court says:

> "It is not necessary for us to determine whether the service of process upon Monroe as managing agent was good or bad."

It is quite apparent from the language used by the court that it would have been proper for it to determine whether there was valid service in the absence of the rule in Kentucky that the appeal constituted a general appearance. There is no intimation or indication that otherwise the defendant would in any way be estopped from questioning the service of process of the Kentucky court.

Again on page 177 of the opinion it is said:

> "The defendant, after its motion to quash the service of process was denied, might have treated it as bad and not defended the action at all; but, having done so, it cannot be said to be deprived of its property without due process of law because held fixed by the usage of the state of Kentucky. York *v.* Texas, 137 U. S. 15, 11 Sup. Ct. 9; 23 L. Ed. 604."

Again it will be observed the court holds the defendant cannot question the validity of the service in Kentucky because of the peculiar Kentucky law.

In Southern Pac. Co. *vs.* Denton, 146 U. S. 202, 36 L. Ed. 942, the Supreme Court refused to recognize the Texas statute mentioned in York *vs.* Texas, *supra*, as applying to a case in Federal Court in Texas. It held the question of jurisdiction was for the determination of the Federal court, regardless of the statutory provisions and that service on a foreign corporation was not valid unless it was doing business in that State.

See also Mex. R. R. *vs.* Pinkney, 149 U. S. 194; 37 L. Ed. 199.

Forsyth *vs.* Hammond, 166 U. S. 506; 41 Law Ed. 1095, is another one of the cases which points out the difference between the party making a special appearance, then after judgment against himself, appealing or applying to a higher court to relitigate the question.

Paragraph No. 5 of the syllabus stated:

> "That one who has voluntarily sought the judgment of the Supreme Court of the state to declare that the decree of the lower court was not only erroneous, but void, although not a voluntary litigant in the trial court, is bound by decision of the Supreme Court as *res adjudicata* and cannot attack it collaterally in the Circuit Court of the United States."

This holding is not that the lower court's judgments may not be attacked collaterally, but that the party affected by it, having taken and invited the decision of another court having judisdiction upon it, will be bound.

11. Under the Federal practice, an appearance to object to the jurisdiction of the court, does not bind the parties appearing to submit to the jurisdiction of the court then overruling the objection.

Hughes Federal Practice, Vol. 6, page 356, Sec. 3817.

Hitchman Coal & Coke Co. *vs.* Mitchell, 245 U. S. 229; 62 Law Edition 260.

Bear in mind that the evidence in this case in the trial in the Iowa Federal court was undisputed as will be seen

on pages 3 and 4 of our original brief. Such state of facts under all the decisions establish that the defendant was not subject to service in the State of Missouri.

In the trial of the case appealed, before the Iowa Federal Court, the sole claim of the plaintiff was that as the Federal Court in Missouri had found against defendant on its motion to quash, the matter became *res adjudicata* on the question of jurisdiction of the Missouri Federal Court and hence the defendant in such a suit on that judgment is estopped of record to challenge the validity of the service.

In other words, the sole contention of the plaintiff was, and has been, through all the entire progress of this case, that even though the defendant was not subject to service in Missouri and not subject to suit there, if defendant in any way questioned the service and the decision was against it, the matter became final and could not be questioned in any other court.

These are the questions in this case. We think that the writ of certiorari should be denied because the undisputed evidence in the trial of the case that the writ was taken from was to establish that the defendant was not subject to suit in the Missouri Federal Court.

Respectfully submitted,

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